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No. 09-297

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

BENETTA BUELL-WILSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Amicus curiae respectfully submits this brief in support of the petition for a writ of certiorari.[1]

INTEREST OF *AMICUS CURIAE*

The Alliance of Automobile Manufacturers, Inc. ("the Alliance") is a nonprofit trade association formed in 1999 and incorporated in Delaware. The Alliance has eleven members: BMW Group, Chrysler Group LLC, Ford Motor Company ("Ford"), General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, and Volkswagen Group of America. Alliance members are responsible for 77% of all car and light truck sales in the United States.

The Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. The Alliance files *amicus curiae* briefs in cases like this that are important to the automo-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties received timely notice of *amicus*'s intent to file this brief. All parties have consented to its filing, and letters reflecting their consent have been filed with the Clerk.

bile industry. The Alliance has previously filed *amicus* briefs in this very case, including a brief in support of an earlier petition. *See, e.g.*, Br. for the Alliance of Automobile Manufacturers and the National Association of Manufacturers as *Amici Curiae* in Support of Petitioner, *Ford Motor Co. v. Buell-Wilson* (No. 06-1068). As indicated in the present petition, this Court granted the earlier petition, vacated the judgment, and remanded for further consideration. *See* 550 U.S. 931 (2007) (GVR order).

The Alliance's members are deeply concerned about the effects of punitive damages awards on the automobile manufacturing industry. Accidents involving automobiles often result in serious injury or death, even when the automobile manufacturer has complied with all applicable safety statutes and regulations, the automobile includes up-to-date safety features, and the manufacturer took great care in the vehicle's design. In designing an automobile, a manufacturer must necessarily make tradeoffs between product performance and safety, taking into account engineering limitations and cost constraints. But under many state products liability laws, juries are permitted to impose punitive damages based on *post hoc* findings that the manufacturer chose wrongly in making those tradeoffs—*viz.*, that in the jury's view, the risks of the product outweigh its benefits. And, juries often award massive punitive damages when they believe the manufacturer made the wrong choice, even when, as here, the manufacturer's good-faith design choice was consistent with industry standards and federal regulations and therefore objectively reasonable. As a result, manufacturers often have no way of knowing

whether their reasonable design decisions may later be subject to punishment, and thus no ability to structure their conduct in order to avoid such punishment. The Alliance believes that this Court's intervention is needed to ensure that manufacturers are not punished without fair notice that their conduct is unlawful.

INTRODUCTION AND SUMMARY

This Court should grant the petition to address the important question whether the Constitution permits punitive damages to be imposed for conduct that objectively reasonable persons could have concluded was lawful. It is a bedrock principle of procedural due process that a person may not be punished without sufficient notice to allow a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This Court has also repeatedly expressed that "concern for adequate notice" in the punitive damages context. *See, e.g., Philip Morris USA v. Williams*, 549 U.S. 346, 353-55 (2007). But thus far, the Court has only addressed the notice required to ensure that the *severity* of punitive damages comports with due process. The Court has not yet squarely resolved the notice required before a defendant's conduct can be subjected to punishment in the first place. It should do so here.

Although we agree with the arguments made in the petition, we write separately to identify three additional reasons why the Court should grant review.

First, the law of California, like the law of many jurisdictions, allows juries to impose punitive damages for almost any product design decision. In making design decisions, manufacturers must necessarily balance the costs and benefits of particular design features. Yet the law of many jurisdictions allows juries to use this inescapable balancing process as the basis for imposing punitive damages. Under the California Court of Appeal's approach, for example, so long as a jury is properly instructed on the state-law elements of punitive damages, that jury has unbounded discretion to award punitive damages in product liability cases, no matter how objectively reasonable the manufacturer was in concluding that its design choice was lawful. That approach deprives manufacturers of fair notice of when they will be subject to punishment, and makes it impossible for manufacturers to structure their conduct in a way that avoids such punishment.

Second, this Court's seminal criminal procedural decisions support applying due process principles not only to the question whether punitive damages are excessive, but also to the antecedent question whether punishment may be imposed in the first place. As this Court has repeatedly observed, punitive damages share the twin goals of criminal law—deterrence and retribution. In the criminal context, due process affords a defendant greater protections with respect to the threshold decision to impose punishment (the guilt stage) than the determination of the severity of that punishment (the sentencing stage). It follows in the punitive damages context that a defendant is due at least as much process in determining whether its conduct triggers punish-

ment at all as in evaluating the permissible degree of that punishment. This Court should grant review and so hold.

Third, this Court's precedents also provide a straightforward rule for evaluating challenges to the application of a punitive damages statute to particular conduct. A statute fails to provide fair notice, and is thus void for vagueness as applied, when it permits punishment for conduct that reasonable people could conclude was lawful. Without that notice, a defendant cannot conform its conduct to the law in order to avoid punishment. It is clear that the product design at issue here was objectively reasonable: it met the strictest applicable federal regulation, comported with industry standards, was reached after considerable study, and was deemed non-defective by fact-finders eleven times prior to this case. Nonetheless, the California Court of Appeal approved $55 million in punitive damages because a twelfth jury determined not only that the design was defective, but that Ford acted with malice in selecting that design. It is one thing for a jury to decide that the design at issue was defective for purposes of liability and compensation; it is quite another, against these undisputed background facts, to hold that punishment could possibly be justified here.

This Court should reject the approach of the California courts and others, under which, so long as a jury is properly instructed on malice, the U.S. Constitution's guarantee of due process places no limits on the jury's decision to impose punitive damages. Instead, it should reaffirm that manufacturers are due fair notice of when they will be subject to pun-

ishment, and that notice is lacking as a matter of law when a manufacturer could have reasonably believed that its conduct was lawful. Only such an objective standard can ensure that manufacturers will be able to structure their conduct to avoid punishment.

ARGUMENT

A. THE DECISION BELOW ALLOWS JURIES TO IMPOSE PUNITIVE DAMAGES FOR VIRTUALLY ANY DESIGN CHOICE, AND THUS DEPRIVES MANUFACTURERS OF THE FAIR NOTICE REQUIRED BY FEDERAL DUE PROCESS

1. The decision below allows juries to impose punitive damages for almost any product design decision, no matter how objectively reasonable. It is now well understood that massive punitive damages awards have become commonplace in product liability cases. Unlike other kinds of torts, product liability claims (and perhaps, most obviously, automobile defect claims) involve both (i) non-intentional conduct by the defendant and (ii) serious physical injury or death suffered by the plaintiff. In these cases, juries are faced with sympathetic, seriously injured plaintiffs (or their families) and routinely told that their injuries could have been prevented if only the manufacturer had spent more money in designing the product. *See* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. 107, 116 (2001) (describing the risk that a manufacturer's "superior *ex ante* risk judgments may be outweighed by the *ex post* reality of the accident victim"). This results in "the stark unpredictability

of punitive awards." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008); *id.* at 2623 ("[P]unitive damages overall are higher and more frequent in the United States than they are anywhere else.").

The California Court of Appeal's approach exacerbates that problem by allowing punitive damages to be imposed in essentially any case in which the jury finds that a product is defective. The California punitive damages statute, like the statutes and common law of many other jurisdictions,[2] allows jurors to impose punitive damages on a defendant guilty of, *inter alia*, "malice"—defined in this case as "despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights or safety of others." Pet. at 4. As applied here, that statute allows juries to impose punishment based on a *post hoc* determination that a manufacturer was aware that it could have made the product safer, even when all objective indicators show that the defendant's conduct was reasonable.

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[2] Numerous state punitive damages statutes include a standard comparable to, or even weaker than, California's "malice" requirement. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 358 n.19 (2003) ("States at present require different evidentiary showings to sustain punitive awards. It is no longer the case that malice or wanton conduct is required; increasingly, state legislatures and courts acknowledge that reckless disregard can suffice."). Other state appellate courts, like California's, have declined to consider whether a particular defendant against whom punitive damages were imposed had fair notice. *See, e.g., Palmer v. A.H. Robins*, 684 P.2d 187, 214-15 (Colo. 1984); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *overruled on other grounds* by *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985); *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 756 (N.D. 1989).

In reality, that is no standard at all, because manufacturers are *always* aware both that their products may cause harm and that those products could be made safer if more money were spent. Unfortunately, many products—and certainly automobiles, which are designed to transport people at high speeds—can and do cause serious injury and death. Yet many of the risks associated with certain products are effectively unavoidable, because consumers are unwilling to accept the cost-tradeoffs required to reduce or eliminate those risks. *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 13-14 (1993). For example, an automobile manufacturer could make every car it designs a tank, but few consumers could afford to purchase it.

In every products liability case, then, a plaintiff will be able to show that some alternative design, identified years later, could have made the product safer. As one pair of commentators has observed, "[r]egardless of how high the manufacturer sets the design safety standard, when an accident does occur, the plaintiff's lawyer will have an expert to testify the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money." Andrew C. Clausen & Annette M. Carwie, *Problems Applying the* Life of Georgia v. Johnson *Case in the Liability Setting: Where Do We Go With Punitive Damages After* BMW v. Gore*?*, 58 Ala. Law. 46, 48 (1997); *see* Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 Vill. L. Rev. 353, 356 (1994) ("the modern products liability case comes with 'intent' built in"). In these cases, "[t]he *ex post* perspective

of litigation exerts a hydraulic force that distorts judgment." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring).[3]

For these reasons, the "malice" standard does not itself provide a manufacturer *any* notice of when it will be subject to punishment, nor does it permit the manufacturer to select designs that will avoid substantial punishment years or even decades later. Applying a malice standard to a non-intentional tort case involving serious injury or death is inherently fraught with arbitrariness unless courts take seriously the notice required by federal due process. Rather than engaging that question at all, the Court of Appeal simply noted that since the jury was properly instructed under a statute that is not facially unconstitutional, its due process inquiry was at an end. That is not only fundamentally wrong, it represents common thinking by state appellate courts and creates enormous problems not only for automobile manufacturers but product manufacturers as a whole.

This case is a textbook illustration of the problem. The design at issue here complied with the strictest applicable federal safety standards and also comported with industry standards. Before this trial, eleven cases involving similar claims had gone

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[3] For recent punitive damages awards involving automobile design, *see, e.g.*, *Mraz v. DaimlerChrysler*, No. BC-332487, (Cal. Super. Ct., L.A. County, Mar. 7, 2007) (awarding punitive damages of $50 million); *Mundy v. Ford Motor Co.*, No. 07-A-74503-2 (Ga. Super. Ct., DeKalb County, Apr. 29, 2009) (awarding punitive damages of more than $30 million).

to judgment, and in all eleven, judgment was entered for petitioner. Pet. at 5. Without the constraint of judge-applied objective standards, a twelfth jury imposed substantial punishment based on its own "personal predilections" concerning risk-utility balancing. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (internal quotation marks omitted). This is the precise result procedural due process is meant to prevent. "Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *Pac. Mut. Life Ins. Co v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting). An aberrant verdict from the twelfth jury to consider a design is not even remotely the kind of notice that allows manufacturers to "order their behavior" to avoid punishment.

2. A system in which juries are permitted to award punitive damages based solely on subjective risk-utility balancing is not only fundamentally unfair to manufacturers; it creates perverse incentives resulting in direct harm to consumers as well. Empirical evidence shows that many jurors decide to inflict punitive damages *because* a defendant has engaged in risk-utility balancing. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 550-51, 556, 589-90 (2000). In other words, jurors conflate intentional *conduct*, such as deciding on a design after a cost-benefit analysis, with intentional *harm*.

Ironically, this sometimes leads juries to punish defendants whose engineers have engaged in the

very thorough study and debate of the risks and benefits of various product designs that the law encourages. Viscusi, *Corporate Risk Analysis*, *supra*, at 550, 558; *see also* Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Product Liability Litigation*, 74 Ky. L.J. 1, 88-89 (1985) (explaining that a responsible manufacturer should balance various factors including risk of harm, durability, ease of operation and manufacture, and cost of materials and labor). Although responsible manufacturers should engage in this kind of balancing *ex ante*, *ex post* it is a "red flag[]" demonstrating a "callous disregard for human health." Viscusi, *Corporate Risk Analysis*, *supra*, at 578; *see also* Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 Wis. L. Rev. 237, 287 n.135 ("It seems widely agreed by both plaintiffs' and defense attorneys that credible trial evidence of cost-benefit balancing—so-called 'trading off lives against dollars'—makes punitive damages particularly likely. This is in stark contrast to the fact that economic efficiency—and deterrence aimed at economic efficiency—requires cost-benefit balancing.").

If manufacturers are subject to punishment under such circumstances, it encourages irresponsible corporate conduct and can even lead manufacturers to stop selling any product that can cause injuries and that some jury *may*, years or even decades later, find could have been made more safe. "[A] firm might be induced to withdraw its product from the marketplace even though consumers place a higher value on the product than its full cost of production, which includes the average harm caused by the

product." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882 (1998). And even for those manufacturers that continue making their products in the face of this risk, the specter of punitive damages is likely to chill innovation. These results harm manufacturers and consumers alike.

B. THIS COURT'S CRIMINAL CASES SHOW WHY DUE PROCESS LIMITS THE THRESHOLD IMPOSITION OF PUNITIVE DAMAGES

This Court has held in many contexts that defendants may not be punished without fair notice that their conduct will subject them to punishment, so that they can structure their behavior in order to avoid such punishment. The petition explains why the decision below is irreconcilable with this Court's punitive damages cases, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996), and its void-for-vagueness precedents, *e.g.*, *Hoffman-Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). *See* Pet. at 14-15.

This Court's criminal law cases provide further support for these conclusions. In the criminal law, defendants are entitled to greater procedural protections at the stage when their threshold guilt is determined than at the stage when the severity of their sentence is decided. In the punitive damages context, this Court has repeatedly held that due process limits the extent of punishment that can be imposed. It follows *a fortiori* that due process constraints ap-

ply at the initial stage of deciding whether a defendant is subject to punitive damages.

1. This Court has frequently analogized jury-imposed punitive damages to criminal penalties. "[P]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989); *see Philip Morris*, 549 U.S. at 358-59 (Stevens, J., dissenting) ("There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages."). As this Court has explained, while compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Imposition of punitive damages, moreover, "is an expression of [a jury's] moral condemnation." *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

Given the "quasi-criminal" nature of punitive damages, *Haslip*, 499 U.S. 1 at 19, this Court has looked to developments in criminal sentencing law for guidance on the permissible extent of punitive damages. In *Exxon Shipping Co.*, for example, this Court—after noting that the "points of similarity" between punitive damages and criminal law "are obvious," 128 S. Ct. at 2628—looked to sentencing developments for instruction on how to attain consistency in damages awards. *Id.* at 2628-29 (explaining that "[t]his federal criminal law development, with

its many state parallels, strongly suggests that as long as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary." (internal quotation marks omitted)). And, in *Gore*, the Court cited a number of criminal cases in announcing guideposts for the review of the severity of punitive damages. 517 U.S. at 575 n.22 (citing, *e.g.*, *Miller v. Florida*, 482 U.S. 423 (1987); *Bouie v. City of Columbia*, 378 U.S. 347 (1964)).

2. It is a basic principle of the criminal law that defendants are afforded greater procedural protections at the guilt stage than at the sentencing stage. For example, defendants have a right to a jury to determine whether they have committed every element of a crime. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). But defendants have no right to a jury to determine their specific sentence. *See United States v. Booker*, 543 U.S. 220, 233 (2005) ("when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."). Similarly, a defendant's guilt must be established beyond a reasonable doubt. *Apprendi*, 530 U.S. at 478. But a judge may determine relevant sentencing factors by a preponderance of the evidence. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986). While the elements of a crime must be set out in an indictment. sentencing factors need not be. *Apprendi*, 530 U.S. at 483. And although at the guilt stage, tribunals "always have been hedged in by strict evidentiary procedural limi-

tations" this is not the case with sentencing. *Williams v. New York*, 337 U.S. 241, 246 (1949). As these differences reflect, heightened procedures apply in the criminal law "when the State threatens to stigmatize or incarcerate an individual for engaging in prohibited conduct." *McMillan*, 477 U.S. at 98 (citing *In re Winship*, 397 U.S. 358, 363-64 (1970)).

3. This Court's holdings in *Gore* and elsewhere impose due process constraints on "the severity of the penalty that a state may impose." *Gore*, 517 U.S. at 559. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416 (citing *Cooper Indus.*, 532 U.S. at 433). For "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* Given this Court's application of due process constraints on the degree of punitive damages that may be awarded, it follows necessarily that the basic due process principle of fair notice applies to the threshold imposition of punishment. This Court should grant the petition to affirm that fundamental principle.

C. THIS COURT SHOULD HOLD THAT OBJECTIVELY REASONABLE CONDUCT IS NOT SUBJECT TO PUNITIVE DAMAGES

This Court's precedents also provide a rule for evaluating the question whether a manufacturer has sufficient notice that it will be punished for its conduct. That rule is readily administrable, and will avoid the problems plaguing lower-court review of

punitive damages awards in non-intentional tort cases today.

1. This Court has already created the appropriate rule for evaluating challenges like this one through its void-for-vagueness doctrine. Under this Court's precedents, a statute authorizing punishment is so vague that it violates due process when it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). This principle applies in civil cases, and this Court has prohibited civil punishments in a variety of cases where reasonable people acting in good faith could disagree on whether the defendant's conduct was lawful. *See, e.g.*, *Giaccio*, 382 U.S. at 402-03; *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 241-43 (1932); *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 238-42 (1925); *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915). These precedents all recognize that no punishment is allowed where people "can—and do—disagree" on what conduct the law prohibits. *Colautti v. Franklin*, 439 U.S. 379, 401 (1979).

In *United States v. Lanier*, this Court recognized that the due process vagueness rule is functionally identical to the qualified immunity rule, which protects public officials from civil liability based on legal obligations that are not "clearly established." 520 U.S. 259, 270-71 (1997). As the Court observed, the qualified immunity test for public officers is "simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the

face of vague criminal statutes." *Id.* This Court's opinions establish that officials are entitled to qualified immunity as long as their conduct is "objectively reasonable"—*i.e.*, as long as reasonable officials could conclude that the conduct at issue was lawful. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (immunity available if officers act in "objectively reasonable manner"); *accord Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (under "settled law," officers are entitled to immunity "if a reasonable officer could have believed" that his or her conduct was lawful (internal quotation marks omitted)); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). "[I]f officers of reasonable competence could disagree on [the matter at] issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

That same rule should govern the question of when a defendant has received fair notice that it may be subject to punitive damages. This Court should hold that punitive damages cannot be imposed when the defendant's conduct was objectively reasonable. Only such an objective standard can ensure that manufacturers will be able to tailor their conduct to the law and avoid arbitrary punishment.

2. The facts of this case highlight how the approach applied by the California courts and others, *see supra* n.2, denies manufacturers the fair notice required by due process. The plaintiffs argued that Ford acted with "malice" in designing the Explorer based on two alleged design defects relating to the strength of the vehicle's roof and the alleged tendency of the vehicle to roll over. They claimed that "Ford had the technology to make the Explorer stable and to strengthen the roof to protect the occu-

pant, but did not use it." Pet. App. 53a. In response, Ford showed that its design complied with federal regulations, exceeded industry standards, and were the subject of good-faith debates among engineers about how best to balance performance and safety. Those objective factors demonstrate that reasonable people could differ concerning whether the benefits of the Explorer's design outweighed its risks. At a minimum, they showed that Ford had ample basis for concluding that its product design was reasonable and would not subject it to punishment.

a. A manufacturer's compliance with applicable federal safety requirements indicates the reasonableness of its conduct. In *Gore*, this Court recognized the relevance of compliance with regulatory standards in assessing the appropriateness of punitive damages. There, the Court noted that "BMW could reasonably rely on state disclosure statutes for guidance" in determining "the appropriate line between presumptively minor damage [to automobiles] and damage requiring disclosure to purchasers." 517 U.S. at 579. Other courts have likewise recognized that punitive damages are inappropriate when a manufacturer complies with applicable regulatory schemes. *See, e.g., Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994); *Welch v. Gen. Motors Corp.*, 949 F. Supp. 843, 845 (N.D. Ga. 1996); *Boyette v. L.W. Looney & Son*, 932 F. Supp. 1344, 1348 (D. Utah 1996). A leading treatise agrees that "[i]n most contexts . . . compliance with a statutory standard should bar liability for punitive damages." W. Page Keeton, *Prosser & Keeton on the Law of Torts* 233 n.41 (5th ed. 1984). In this case, Ford demonstrated that the Explorer complied with all

applicable standards promulgated by the National Highway Transportation Safety Administration ("NHTSA"), the federal agency charged with setting automotive safety requirements.

b. Compliance with industry standards offers a further objective indication that punishment is inappropriate. Numerous courts have recognized that punitive damages cannot be justified under the amorphous "malice" standard when a manufacturer's product comports with then-current industry standards. *See, e.g., Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995); *Drabik v. Stanley-Bostitch*, 997 F.2d 496, 510 (8th Cir. 1993); *Nigro v. Remington Arms Co.*, 637 A.2d 983, 989-90 (Pa. Super. Ct. 1993). Here, plaintiffs' Ford Explorer had "one of the best roll-over rates compared to other SUVs in its class.," Pet. App. 25a (internal quotation marks and alteration omitted); the Explorer complied with five commonly used vehicle stability tests, Reporter's Transcript ("RT") 3635-36, 3657; and for ten consecutive years, Consumer's Union awarded the Explorer a "recommended" rating for safety based on independent testing, RT 3232. Those test results demonstrate the effectiveness of the Ford engineers' design. They confirm further that Ford had no basis for predicting that its design could be deemed not only defective but maliciously so.

c. The existence of a good-faith debate over the best design is another objective indicator that reasonable people could disagree over whether a manufacturer's conduct in designing a product was lawful. Many courts have observed that punitive damages are not appropriate when there has been a genuine scientific or engineering debate about a design. *See,*

e.g., *Satcher*, 52 F.3d at 1316-17; *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994).

Here, Ford engineers devoted considerable good-faith efforts to vehicle safety when designing the Explorer. *See* AA 2483-88; AA 2502. In making those decisions, Ford balanced an incremental safety advantage above the levels approved by NHTSA and validated by testing with tradeoffs for consumers in cost and other desirable features. The fact that Ford engineers debated plaintiffs' alleged design defects and came to opposite conclusions shows that the company was engaging in precisely the "line-drawing," *Gore*, 517 U.S. at 579, that a manufacturer must make all the time in selecting a design. The fact that there was a debate in the engineering and regulatory community over the proper standards reveals that Ford lacked fair notice that its decisions could subject it to punitive damages.

* * * * *

Each of these factors demonstrates that Ford's product design was objectively reasonable. In affirming the punitive damages verdict here, the Court of Appeal set aside all of these objective indicators upon which reasonable people would rely, based solely on the fact that the jury was properly instructed, and then decided to impose punitive damages. Pet. App. 28a, 56a-57a. Although proper jury instruction under state law may be necessary, it is insufficient on its own to afford a defendant due process. Without reference to objective standards, punitive damages statutes like the one at issue here can be so vague as applied that manufacturers simply cannot know what non-intentional conduct a jury might later decide warrants punishment. By failing

even to engage in the appropriate due process analysis, the Court of Appeal erred. Because that error is both commonplace in lower courts and devastating to automobile manufacturers, this Court should grant review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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